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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1134

FRANCES J. DUGAN,

Petitioner,

v.

PAUL H. NITZE, ET AL.,

Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner moves the Court for rehearing of the Order of this Court entered May 2, 1966 on the petition for a writ of certiorari and prays the Court upon such reconsideration to grant the petition for writ of certiorari heretofore filed herein.

OPINIONS BELOW

There were no opinions by the court below.

JURISDICTION

Petitioner seeks to review judgment of the United States Court of Appeals for the District of Columbia Cir-

cuit entered in this case on December 14, 1964 (R. 330). Motion for rehearing was denied by the Court on December 21, 1965 (R.337). The jurisdiction of this Court is invoked under 28 U.S.C. par. 1259(1), and Rule 58 of the rules of this court. Petition for certiorari was denied May 2, 1961

QUESTIONS PRESENTED

1. Whether the substantial grounds for the granting of certiorari as set forth in this Motion for Rehearing, which were not presented previously in the petition for writ of certiorari, warrant the granting by the Court of this Motion for Rehearing.

2. Whether the Navy Department is bound by a federal statute and its own regulations.

3. Whether petitioner, a United States Civil Service permanent, preference eligible employee, who had completed his probationary period, with Veterans' preference, was unlawfully reduced in rank when the provisions of Section 14 of the Veterans' Preference Act of 1944 (Title V U.S.C., par. 863) and prescribed Departmental regulations were not followed.

ARGUMENT

1. The decision of the lower court and this Court's denial of petition for certiorari are contrary to prior decisions of this Court and other courts requiring administrative agencies to comply with federal statutes and their own regulations, and warrants the reversal of the decision of the court below.

The Court has apparently overlooked its decisions in the cases of *Service v. Dulles*, 354 U.S. 363 and *Watson v. United States*, 355 U.S. 14, which cases were not mentioned in the petition for certiorari.

In *Service v. Dulles*, 354 U.S. 363, suit was instituted

by a foreign service officer to test the validity of his discharge by the Secretary of State under these circumstances: The State Department's Loyalty Security Board had repeatedly cleared petitioner of charges of being disloyal and a security risk. Its findings had been approved by the Deputy Undersecretary whose approval of findings favorable to an employee were final under the applicable regulations. No findings unfavorable to petitioner ever had been made by the Department's Loyalty Security Board or the Deputy Undersecretary. Nevertheless, the Loyalty Review Board of the Civil Service Commission on its motion conducted its own hearing and found that there was reasonable doubt as to petitioner's loyalty and advised the Secretary that petitioner should be dropped and removed from the rolls of the Department of State, acting solely on the basis of the finding of that Board and without making any independent determination of its own on the record in the case and promptly discharged petitioner, basing his action on Executive Orders 9835 and 10241 and paragraph 103 of Public Law 188, 82nd Congress, which authorized the Secretary to "terminate the employment of any officer * * * in the foreign service whenever he shall deem such termination necessary or advisable in the interest of the United States." The Court held petitioner's discharge was invalid because it violated the Regulations of the Department of State and judgment was reversed.

The Court granted certiorari in *Watson v. United States*, 335 U.S. 14, where judgment was vacated and the case remanded for reconsideration in the light of the opinion in *Service v. Dulles, infra.*

The decision in the case of *Service v. Dulles* followed its decision in *Accardi v. Shaughnessy*, 347 U.S. 260 which holds that regulations validly prescribed by the Government are binding upon the Government as well as the citizen, even where the administrative action under review was discretionary in nature.

This Court determined in *Service v. Dulles*, *Watson v. United States*, and *Accardi v. Shaughnessy* that Departmental regulations establishing rights for employees must be complied with. Neither these cases nor the following cases were called to the Court's attention in the petition for certiorari filed herein:

In *Stringer v. United States*, 90 F. Supp. 375, at page 379, referring to non-compliance with Section 14 of the Veterans' Preference Act, the United States Court of Claims said:

> "The requirements of Section 14 are specific and mandatory. Neither this court nor the Civil Service Commission, nor the Chief of Engineers can disregard them. Strict compliance is required. *Lamb v. United States*, Ct. Cl., 90 F.Supp. 369; *Gadsden v. United States*, 78 F.Supp. 126, 11 Ct. Cl. 487; *Wittner v. United States*, 76 F.Supp. 110, 110 Ct. Cl. 231; *Elchibegoff v. United States*, 106 Ct. Cl. 541."

Petitioner contends that certain procedural rights given him by the Veterans' Preference Act were denied. As was said by the United States Court of Claims in *Washington v. United States*, 147 F.Supp. 284, at page 286:

> "In this situation we are not authorized to consider the merits of plaintiff's case but merely whether or not his procedural rights have been violated. *Engelhardt v. United States*, 125 Ct. Cl. 603; *O'Brien v. United States*, 124 Ct.Cl. 655. * * *"

The courts on different occasions have decided that the acts of agencies and the Civil Service Commission "violative of the law and applicable regulations" may be reviewed. *Ritter v. Strauss*, 261 F.2d 767, 104 U.S. App. D.C. 301. *Feldman v. Herter*, 276 F.2d 485, 107 U.S. App. D.C. 239. *Kinter v. Toll*, 276 F.2d 486. *Powell v. Brannan*, 91 U.S. App. D.C. 16, 196 F.2d 871.

It was said in *Lamb v. United States*, 90 Fed. Supp. 369 at 374:

> "The Act and the Regulations require, among other things, that a preference eligible must be given a thirty-day notice of proposed action to discharge, which notice must set forth any and all reasons in detail for such proposed action; that the employee shall be given a reasonable time within which to answer personally and in writing the charges and notification of proposed adverse action. Next the employee is entitled to receive a notice of adverse decision based on the matters referred to in the prior notice and on any answer thereto made by the employee. * * *"

The United States Court of Appeals for the District of Columbia Circuit, in the case of *Reynolds v. Lovett,* 201 F.2d 181, ruled that in the reduction of personnel, Section 12 of the Veterans' Preference Act, 5 U.S.C.A. 861, must be followed.[1]

The provisions of Section 14 of the Veterans' Preference Act, 5 U.S.C.A., paragraph 863, were held, by the United States Court of Appeals for the District of Columbia Circuit, to be mandatory in *Wittner v. United States,* 76 Fed. Supp. 110.

Petitioner's reduction in rank was accomplished without compliance with Section 14 of the Veterans' Preference Act. No reasons were given therefor in writing. He was not given thirty days' advance written notice of the proposed action nor did he receive a statement of "any and all reasons, specifically and in detail" for his reduction in rank and was deprived of his right to appeal to the United States Civil Service Commission from the adverse decision of the administrative officer who reduced him in rank. Although he tried to appeal, his appeal was arbitrarily refused (J.A. 120).

The United States Court of Claims, in the case of *Elchibegoff v. United States,* 106 Court of Claims 541, held these provisions of law in respect to charges against

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[1] See concurring opinion of Circuit Judge Clark at 201 F.2d 182.

Civil Service employees were mandatory and the procedure established by the Veterans' Preference Act must be followed to satisfy law. In order to effect a legal dismissal, the Court said:

> "If the procedure provisions are not mandatory they are largely meaningless. The officials could act as if such provisions were never put into the law. They could apply or not apply them to suit their whim, just as they do, or do not, take their morning calisthenics depending on whether they feel like it. We cannot believe Congress had any such idea in mind.
>
> "In similar cases this Court has heretofore invoked the same line of reasoning. *United States v. Perkins*, 116 U.S. 483, 6 S.Ct. 449, 29 L.Ed. 700; and *United States v. Wickersham*, 201 U.S. 390, 26 S.Ct. 469, 50 L.Ed. 798.
>
> "In the *Wickersham* case, *supra*, the court, on page 399 of 201 U.S., page 472 of 26 S. Ct., uses the following language:
>
> '* * *We see no reason * * *for withholding * * * the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employee in the public service, protected by the statute and the orders of the President made in pursuance thereof, can be deprived of the benefit and emolument of his position by a wrongful and illegal suspension from his duties. We do not think such a contention can be sustained either by reason or authority. * * *
>
> "The Veterans' Preference Act provides in effect that no veteran eligible, employed in any department or agency of the government, shall be discharged, 'except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person * * * shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; * * *' and ' shall be allowed a reasonable time for answering the same personally and in writing.'
>
> "The language is clear. It does not prevent a

discharge, if the procedure is followed, but it does forbid a discharge unless it is followed."

The same Veterans' Preference Act, referred to above, is involved in the instant case, where the following wording is involved:

"Section 14 of the Veterans' Preference Act of 1944 (Title 5, U.S.C., par. 863), provides:

'No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be * * * reduced in rank or compensation * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or *reduction in rank* or compensation is sought shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right of appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision * * *." (emphasis supplied)

2. The specific regulations of the Navy Department which were not followed.

The guide lines for determining whether a reassignment constitutes a reduction in rank is found in Naval Civilian Personnel Instruction 352 4-4 (J.A. 123) which reads as follows:

A. General

"When the reassignment of a veteran preference employee is proposed, the activity must determine whether the reassignment will constitute a 'reduction in rank' within the purview of Section 14 of the Veterans' Preference Act of 1944. If so, it must be treated as an adverse action and the procedures in NCPI 352.5-6 must be followed.

b. Guidelines for determining whether a reassignment constitutes a reduction in rank.

"Neither the Veterans' Preference Act nor the Civil Service Commission's regulations specify the circumstances in which a reassignment (which involves no reduction in compensation) is a reduction in rank. Commission decisions, however, indicate that the following comparisons, between these positions from and to which reassignment is proposed, are necessary:

"(1) Organization level, particularly when supervisory positions are involved.
"(2) Levels of supervisions to which the positions report.
"(3) Promotional opportunities."

When those guidelines (1) organization level, (2) levels of supervision and (3) promotional opportunities are applied to the instant case, it is clear that there has been a reduction in petitioner's rank (J.A. 123).

The Naval Personnel Instructions (hereinafter referred to as NCPI) and specifically NCPI 351 (J.A. 17) require that all reassignments including those caused by reorganizations must be effected under the Reduction-in-Force Procedure. NCPI 351.2-5q provides:

"Reduction in Force

"2-5. Definitions

"*q. Reassignment.*

"Any position change of an employee from one position to another within the Naval Establishment whether the movement is upward (promotion), downward (change to lower grade), or lateral

(movement without promotion or change to lower grade)."

* * *

"NCPI 351—Reduction in Force

"2-3. Use of Reduction-in-Force Procedure

"Following is an explanation of what does and does not constitute a reduction-in-force action.

"a. When one or more employees are to be released from a competitive level, by separation, furlough for more than 30 days, or reassignment involving displacement, or change to lower grade, because of lack of work, shortage of funds, reorganization, or to make positions available to persons exercising restoration or reemployment rights, all resultant actions are reduction-in-force actions and must be effected in accordance with this instruction.

"b. The criteria in NCPI 352 will be used to determine whether the change to lower grade of an employee is a reduction-in-force action."

Although it was mandatory that the Boston Naval Shipyard effect the reassignments to Group Master and Head of Shop positions in accordance with the Reduction-in-Force Procedures, such procedures were not followed here.

Since petitioner, as Master Shipfitter and F. J. Simon, as Master Sheetmetalworker, were both eligible and qualified for reassignment to the Group Master position (J.A. 134-135) (J.A. 19-20, par. 23-26), it is seen that the former positions of both the plaintiff F. J. Dugan and F. J. Simon were interchangeable with the position of Group Master under the criteria of NCPI 351.42(b). (J. A. 18, para. 22) which provides:

"NCPI 351—Reduction in Force

"4-2. Competitive Levels.

"*b. Determining interchangeability between positions.*

"By interchangeability is meant such similarity between official duties of the positions that incumbents can be changed from one to the other without an unreasonable period of training or adjustment. Positions are interchangeable if it is found that the same knowledge, technique and know-how are required in performing the official duties, taking into consideration laws, orders, rules, regulations, policies, procedures, or skills that must be applied."

It was mandatory that the Boston Naval Shipyard establish a "competitive level" as defined in NCPI 351.2-5e (J.A. 18) to group the positions of Master Shipfitter and Master Sheetmetal worker for initial reduction-in-force competition to determine which employee would be separated from, and which would be retained in, their respective positions.

NCPI 351.2-5(e) provides:

"NCPI 351— Reductions in Force

"2-5. Definitions

"*e. Competitive level.*

"The grouping of positions for initial reduction-in-force competition to determine which employees will be separated from, and which will be retained in, their positions. All positions, within a competitive area, of such similarity that interchange of personnel is feasible are placed in the same competitive level. See NCPI 351.4-2."

After the establishment of a "competitive level," as required by NCPI 351.2-5e (J.A. 18) the Boston Naval Shipyard did not comply with the criteria of NCPI 351.2-3 (J.A. 20-21) and NCPI 351.4-3b(1), Group I, and NCPI 351.4-3b(1), Group I (c)(d) J.A. 21-22, para. 26) to determine which employee had the greater retention preference rights. Petitioner, a war veteran, is, in accordance with this criteria, in Retention Sub-Group I A and F. J. Simon, a non-veteran, is in Retention Sub-Group I B (J.A. 27). Therefore, petitioner in Retention Sub-

Group I A possessed greater seniority or retention rights than F. J. Simon possessed in the lower seniority or retention group I B. Petitioner with the greater seniority or retention preference rights when "reached for action" would have been reassigned to the position of Group Master (J.A. 27) if the Navy's regulations were followed.

It is clear by the criteria of NCPI 351.6-3(1)(2)(3) and NCPI 351.9-7 (J.A. 22-23, para. 27) that the respondent did not have the authority, within the criteria of the Naval Civilian Personnel Instructions, to make any exception to the regular order of selection (J.A. 23, para. 28). Therefore under the Reduction-in-Force Procedures, or Retention Preference Regulations, cited above, respondent did not have the authority to effect the reassignment of F. J. Simon to the Group Master position; and it was at the same time mandatory that the Boston Naval Shipyard effect the reassignment of the petitioner to the Group Master position on 1 Feb. 1961.

Further, the respondent did not comply with the provisions of NCPI 310.2-2 (J.A. 25) in effecting the reassignments to Group Master and Head of Shop on 1 Feb. 1961. That regulation provides:

> "NCPI 310—Appointments and other Accessions
>
> "2-2. Positions Must Be Established
>
> "Before an accession may be made in the Federal service, there must be an established position for the employee to occupy."

There was no Offficial Job Position Description Sheet for either the Group Master or Head of Shops positions in existence in the shipyard to define the official duties of these positions on 1 Feb. 1961. Therefore there was no authority to effect reassignments to either of these positions on 1 Feb. 1961. The position of Group Master has been subsequently established (J.A. 25, para. 32) but the position of Head of Shop was not properly established (J.A. 143, par. 11).

Further, the Boston Naval Shipyard did not comply with the criteria of NCPI 352 4-2 (J.A. 26-28, par. 32-34) in effecting the reassignment of petitioner F. J. Dugan as Head of Shops on 1 Feb. 1961.

> "NCPI 352—Separations (Nondisciplinary), Furloughs and Changes to Lower Grade
>
> "4-2. Change to Lower Grade
>
> "*c. Applicability of Retention Preference Regulations to change to lower grade.*
>
> "Reduction in force procedures (NCPI 351) will be used to select employees to be changed to lower grade when such changes are caused by:
> (1) lack of work
> (2) lack of funds
> (3) reorganization
> (4) exercise of regulatory reassignment or reemployment rights.
>
> "As used in (3) above, 'reorganization' means the planned eliminations, additions, or redistribution of functions and duties within an organization. Thus, the reduction-in-force system will govern any adverse action brought about by deliberate management action to change official duties previously assigned, where the reasons are impersonal to the affected employee. This applies to unpublicized positions under his control, as well as to changes resulting from formal reorganization orders affecting complete organizations."

Petitioner was entitled to the protection of NCPI 351.9-3 (J.A. 23, para. 28-29) and NCPI 351.10-5a(6)b (J.A. 24, par. 29-30) and requests the Court to provide such relief as is stated on J.A. 139, paragraph 9, by ordering that the respondent comply with the criteria of Naval Civilian Personnel Instructions that were in full effect on 1 Feb. 1961 (J.A. 38-40, para. 56 1/2 - 57) when the reassignments of F. J. Simon and petitioner were placed in effect.

The decision of the Court below which has the effect of holding Government Departments need not follow statutes and regulations promulgated by such Departments

may have a far-reaching impact upon the rights of government employees who are reassigned in the closing of bases and consolidations and reorganizations of government offices throughout the country. The law as construed in the instant case establishes a precedent which can thwart the intention of Congress with respect to protecting Government employees from having their rights as given by statute and regulation impaired or abolished. Therefore, this Court in the exercise of its prerogative, should take jurisdiction here and correct the decision of the lower court.

The foregoing constitutes substantial grounds for granting this petition for certiorari which were not presented in such petition. Such omission warrants the granting of this motion for reconsideration.

Respectfully submitted,

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I certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of this Court.

WARREN E. MILLER